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No. 02-322

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER

v.

CITY OF CHICAGO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

This case involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document (a) the tracing of firearms believed to be involved in crimes (the Trace Database) and (b) information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions presented are as follows:

1. Whether individual names and addresses in the Trace Database and the Multiple Sales Database are exempt from compelled disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), which encompasses "records or information compiled for law enforcement purposes" when the production of such records "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

2. Whether various categories of information contained in the Trace Database are protected from disclosure under FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A), which encompasses law enforcement records when the production of such records "could reasonably be expected to interfere with enforcement proceedings."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	15
Argument:	
I. The individual names and addresses contained in the Multiple Sales and Trace Databases are exempt from compelled disclosure under FOIA Exemption 7(C)	19
A. Release of individual names and addresses in the Multiple Sales and Trace Databases would substantially intrude upon legitimate privacy interests	20
1. The Multiple Sales Database	22
2. The Trace Database	25
B. Release of individual names and addresses contained in the Trace and Multiple Sales Databases would not meaningfully advance the public interest in evaluating ATF's conduct	28
C. The privacy interests that would be invaded by release of the requested names and addresses substantially outweigh any public interest in disclosure that is relevant to the Exemption 7(C) balance	32
II. ATF's withholding policies with respect to the Trace Database are appropriate under Exemption 7(A)	34

Table of Contents—Continued: Page

A. The government may establish the applicability of Exemption 7(A) by demonstrating that release of information within particular categories could reasonably be expected, as a general matter, to cause interference with law enforcement proceedings 35
B. In processing respondent's request for information contained in the Trace Database, ATF sought to prevent disruption of ongoing law enforcement investigations while respecting FOIA's open government objectives 37
C. ATF reasonably determined, and extensively explained its conclusion, that premature release of information in the Trace Database could be expected to cause interference with law enforcement investigations 40
D. The court of appeals offered no persuasive ground for rejecting ATF's considered judgment that premature release of information in the Trace Database could reasonably be expected to cause interference with law enforcement proceedings 47
Conclusion 50

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Serv. Co. v. *EPA*, 856 F.2d 309 (D.C. Cir. 1988) 36
Bibles v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) 4, 28, 29
Burge v. *Eastburn*, 934 F.2d 577 (5th Cir. 1991) 26

Cases—Continued: Page

City of Chicago v. *Beretta U.S.A. Corp.*, No. 1-00-3541, 2002 WL 31455180 (Ill. App. Ct. Nov. 4, 2002) 12
Crooker v. *BATF*, 789 F.2d 64 (D.C. Cir. 1986) 37, 48
Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987) 36
FLRA v. *United States Dep't of Defense*, 977 F.2d 545 (11th Cir. 1992) 21
FTC v. *Grolier Inc.*, 462 U.S. 19 (1983) 2
Fitzgibbon v. *CIA*, 911 F.2d 755 (D.C. Cir. 1990) 26
Halloran v. *Veterans Admin.*, 874 F.2d 315 (5th Cir. 1989) 30
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 2, 37
Landano v. *United States Dep't of Justice*, 956 F.2d 422 (3d Cir.), cert. denied, 506 U.S. 868 (1992) 25
Manna v. *United States Dep't of Justice*, 51 F.3d 1158 (3d Cir.), cert. denied, 516 U.S. 975 (1995) 26, 36
NAACP v. *Acusport Corp.*, Nos. 99 CV 7037 (JBW) & 99 CV 3999 (JBW), 2002 WL 31234633 (E.D.N.Y. Sept. 18, 2002) 7
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) 3, 35, 36, 45
National Ass'n of Retired Fed. Employees v. *Horner*, 879 F.2d 873 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) 21
Neely v. *FBI*, 208 F.3d 461 (4th Cir. 2000) 26
Painting & Drywall Work Pres. Fund, Inc. v. *Department of Hous. & Urban Dev.*, 936 F.2d 1300 (D.C. Cir. 1991) 3
SafeCard Servs., Inc. v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991) 32

Cases—Continued: Page

Senate of the Commonwealth of P.R. v. *United States Dep't of Justice*, 823 F.2d 574 (D.C. Cir. 1987) 30
United States Dep't of Def. v. *FLRA*, 510 U.S. 487 (1994) 4, 20, 21, 23, 28, 30, 32
United States Dep't of Def. Dep't of Military Affairs v. *FLRA*, 964 F.2d 26 (D.C. Cir. 1992) 30
United States Dep't of Justice v. *Julian*, 483 U.S. 1 (1988) 3
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) ..... *passim*
United States Dep't of the Navy v. *FLRA*, 975 F.2d 348 (7th Cir. 1992) 21
United States Dep't of State v. *Ray*, 502 U.S. 164 (1991) 27, 32
Whalen v. *Roe*, 429 U.S. 589 (1977) 24
Weinberger v. *Catholic Action*, 454 U.S. 139 (1981) 2

Statutes and regulations:

Freedom of Information Act, 5 U.S.C. 552:
5 U.S.C. 552(b) 2, 13
5 U.S.C. 552(b)(6) 12, 13, 20
5 U.S.C. 552(b)(7) 3, 19, 20
5 U.S.C. 552(b)(7)(A) ..... *passim*
5 U.S.C. 552(b)(7)(C) ..... *passim*
Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48 36
Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 ..... *passim*
18 U.S.C. 922(g) 24
18 U.S.C. 922(n) 24
18 U.S.C. 923 4
18 U.S.C. 923(g) 5

Statutes and regulations—Continued: Page

18 U.S.C. 923(g)(1)(B)(iii) 25
18 U.S.C. 923(g)(1)(D) 12
18 U.S.C. 923(g)(3)(A) 5, 11, 22, 23
18 U.S.C. 923(g)(3)(B) 16, 24, 25
18 U.S.C. 923(g)(7) 5, 25
18 U.S.C. 926(a) 26
18 U.S.C. 3282 9
Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 4
27 C.F.R.:
Section 178.126 5
Section 178.126a 5

Miscellaneous:

148 Cong. Rec. H5352-03 (daily ed. July 24, 2002) 39
Bureau of Alcohol, Tobacco and Firearms, *2000 Crime Gun Trace Report* (visited Jan. 2, 2002) <http://www.atf.treas.gov/pub/fire-explo__pub/pdf/followingthegun_internet.pdf> 30
Bureau of Alcohol, Tobacco and Firearms, *Firearms and Explosives Publications* (visited Jan. 2, 2002) <http://www.atf.treas.gov/pub/index.htm#Firearms> 30
H.R. Rep. No. 575, 107th Cong., 2d Sess. (2002) 39
S. Rep. No. 221, 98th Cong., 1st Sess. (1983) 36

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 287 F.3d 628. The order amending the opinion upon denial of rehearing (Pet. App. 17a–18a) is reported at 297 F.3d 672. The opinion of the district court (Pet. App. 19a-30a) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 25, 2002. A petition for rehearing was denied on July 25, 2002 (Pet. App. 17a–18a). The petition for a writ of certiorari was filed on September 3, 2002, and was granted on November 12, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part as follows:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, * * * [or] (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

5 U.S.C. 552(b)(7)(A) and (C).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, generally mandates disclosure upon request of records held by an agency of the federal government. Section 552(b), however, identifies categories of records that are exempt from compelled disclosure. The Act thus reflects Congress's determination "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action*, 454 U.S. 139, 144 (1981).

In interpreting the FOIA, "this Court has recognized that the statutory exemptions are intended to have meaningful reach and application." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). The Court has also emphasized the need for a "practical approach" to the interpretation of the FOIA. *Id.* at 157; see *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983) (noting the importance of "workable rules" governing the implementation of the FOIA); *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 779 (1989) (quoting *Grolier*). Application of the

FOIA exemptions to particular records generally does not turn on the identity of the requesting party or his purpose in seeking disclosure of the information. See *id.* at 771-772 (citing cases). Rather, the legal and practical effect of a judicial order mandating disclosure under the FOIA is that the pertinent information must be released to all who seek it, "regardless of the uses to which it might be put." *Painting & Drywall Work Pres. Fund, Inc.* v. *Department of Hous. & Urban Dev.*, 936 F.2d 1300, 1302 (D.C. Cir. 1991).[1]

FOIA Exemption 7, 5 U.S.C. 552(b)(7), authorizes an agency to withhold various categories of "records or information compiled for law enforcement purposes." Exemption 7(A), 5 U.S.C. 552(b)(7)(A), authorizes the withholding of such law enforcement records where disclosure "could reasonably be expected to interfere with enforcement proceedings." In invoking Exemption 7(A), an agency need not demonstrate a likelihood of interference with law enforcement proceedings on a document-by-document basis. Rather, the agency and the reviewing court may "determin[e] that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (emphasis added).

FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), authorizes withholding of records the disclosure of which "could reasonably be expected to constitute an unwarranted invasion

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[1] An exception to the general rule of FOIA administration set forth in the text exists in "cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege." *Reporters Committee*, 489 U.S. at 771. In such cases the requester may waive the privilege and obtain access to the records, even though the information would be exempt from disclosure to a third party. *Ibid.*; see *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 13-14 (1988). That exception is not implicated here.

of personal privacy." The determination whether an invasion of privacy is "unwarranted" within the meaning of Exemption 7(C) requires a balancing of the public interest in disclosure against the privacy interests that Congress intended to protect through the exemption. *Reporters Committee*, 489 U.S. at 762. "[T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government*." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 495 (1994) (brackets and internal quotation marks omitted); see *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). An agency may invoke Exemption 7(C) without demonstrating on a document-by-document basis that the relevant privacy interests outweigh the public interest in disclosure. Rather, as with Exemption 7(A), "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *Reporters Committee*, 489 U.S. at 776; see *id.* at 776-780.

2. The Bureau of Alcohol, Tobacco and Firearms (ATF) is a regulatory and criminal investigatory agency currently located within the Department of the Treasury.[2] ATF is responsible for, *inter alia*, the enforcement of federal firearms laws, including the Gun Control Act of 1968 (GCA), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. 921-930). The GCA established a licensing system for persons (known as Federal Firearms Licensees or FFLs) who are engaged in manufacturing, importing, dealing, and collecting firearms. 18 U.S.C. 923. The GCA requires FFLs to keep records of firearms acquisition and disposition, maintain that information at their business premises, and make those records available to ATF under certain specified circumstances. 18 U.S.C. 923(g). An FFL must also submit a report to ATF and to state and local law enforcement officials whenever the FFL sells or otherwise disposes of two or more handguns to an unlicensed person within any period of five consecutive business days. 18 U.S.C. 923(g)(3)(A). The GCA further requires an FFL to respond within 24 hours after receiving a request from ATF for such records as may be required to determine the disposition of one or more firearms "in the course of a bona fide criminal investigation." 18 U.S.C. 923(g)(7).[3] In the course of carrying out its duties under the GCA, ATF has created and maintains the Firearms Tracing System (FTS), a massive electronic database that serves to support criminal investigations by federal, state, local, and international law enforcement agencies. This case arises out of a FOIA request for data from two sub-modules of the FTS—the Trace Database Sub-Module (Trace Database) and the Multiple Sales Database Sub-Module (Multiple Sales Database). J.A. 30.[4]

[2] Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, ATF will become a component of the Department of Justice on January 24, 2003.

[3] Under the authority of the GCA (see 18 U.S.C. 923(g)), the Department of the Treasury has issued regulations to implement the Act's record-keeping requirements. See 27 C.F.R. 178.126, 178.126a.

[4] The nature and purposes of the Trace and Multiple Sales Databases, and the justifications for ATF's disclosure policies with regard to those records, were described in a declaration executed by David L. Benton, ATF's Assistant Director for Field Operations, which was filed in the district court in this case. J.A. 18-58. Mr. Benton was at that time the principal assistant to the Director in policy formulation and implementation of ATF's enforcement efforts involving ATF Special Agents and inspectors assigned to ATF's 23 field divisions nationwide. In that capacity, Mr. Benton personally reviewed or was briefed daily on investigations pertaining to criminal firearms enforcement. Mr. Benton began his ATF career as a Special Agent in 1975 and has served in a variety of managerial and supervisory positions. During his career, Mr. Benton initiated numerous firearms traces as a criminal investigator and supervised a wide variety of firearms enforcement activities, including investi-

a. *The Trace Database* The Trace Database is used by ATF to store and analyze data compiled when a law enforcement agency contacts ATF and requests that ATF initiate a trace on a weapon that has been recovered in connection with a criminal investigation. J.A. 21-24. To request a trace, the investigating agency must provide ATF with the manufacturer, weapon type, caliber, and serial number of the firearm. J.A. 23. In addition, the requesting agencies typically voluntarily provide ATF with additional data concerning the weapon to be traced, including the location where the weapon was recovered by the requesting agency, the identity of any last known possessor of the firearm, and the identities of any persons found with the possessor at the time the gun was recovered. See J.A. 39-41.

In a typical case, ATF begins the tracing process by contacting the firearm's manufacturer or importer in order to identify the FFL to whom the weapon was initially sold. J.A. 23. The tracing continues through FFLs involved in subsequent transactions, with the goal of identifying the individual consumer who first purchased the gun at retail from an FFL. *Ibid.* The tracing process stops at the first retail purchase, because any subsequent sale or transfer of the firearm by a non-FFL is not subject to the GCA's

gations of firearms traffickers and violent criminal organizations. In his prior position as Assistant Director for Liaison and Public Information, Mr. Benton was responsible for all ATF FOIA disclosure decisions and served as the deciding official on numerous FOIA requests for data from the Trace Database. J.A. 18-20. Mr. Benton later became ATF's Deputy Director and retired from government service in the summer of 2002.

Appended to Mr. Benton's declaration were letters to the Director of ATF from the National President of the Fraternal Order of Police and the Chairman of the Law Enforcement Steering Committee. Those letters urged ATF not to release to the public the contents of the Trace Database at issue here, based on concern that disclosure of the data could lead to destruction of evidence and possible harm to law enforcement personnel, informants, and witnesses. Gov't C.A. App. 90-93.

record-keeping and reporting requirements. *Ibid.* Approximately one-half of the trace requests in any given year successfully identify the first retail purchaser of the firearm. J.A. 24. ATF sends the results of each trace to the law enforcement agency that requested the trace. *Ibid.*

The Trace Database contains information associated with each of more than 200,000 firearm traces conducted by ATF each year for more than 17,000 law enforcement agencies. J.A. 24. As of November 9, 2000, the database contained data associated with 1,261,593 traces, of which 920,655 were initiated by state and local law enforcement agencies. *Ibid.*[5] The Trace Database contains approximately 300 data elements for each trace request; those data elements include information provided to ATF by the agency that requests the trace, as well as information that ATF acquires during the tracing process. Those elements consist of data relating to (a) the law enforcement agency requesting the trace; (b) the date and location where the traced firearm was recovered; (c) the purchaser of the firearm; (d) the possessor of the firearm at the time of its recovery; (e) individuals associated with the possessor; (f) the licensed dealers who have sold the firearm; and (g) the traced weapon itself (*e.g.*, the manufacturer, model, weapon type, caliber, and serial number). J.A. 31-32.

Because of its size and electronic format, the Trace Database also provides a valuable analytical investigative resource that ATF can utilize "to identify possible illegal firearms trafficking, independent of any particular trace request." J.A. 27. For example, Online LEAD is a

[5] In *NAACP* v. *Acusport Corp.*, Nos. 99 CV 7037(JBW) & 99 CV 3999 (JBW), 2002 WL 31234633 (E.D.N.Y. Sept. 18, 2002), in which trace data were produced pursuant to a protective order but not made public, the court stated that as of the date of its decision the Trace Database contained records of approximately 1.5 million completed traces. See *id.* at *7.

computer-based software program that uses commercially available software to perform automated analyses by linking information from numerous records—*e.g.*, records of diverse firearm traces performed at the request of criminal enforcement agencies throughout the Nation, as well as records of multiple sales of firearms—to identify patterns of sales that may indicate criminal activity. J.A. 26-27. It "provides investigative leads to ATF Special Agents and police officers working with ATF regarding illegal firearms traffickers by analysis of FTS data." J.A. 27. Similarly, the Youth Crime Gun Interdiction Initiative (YCGII) seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns. *Ibid.* The YCGII is ATF's "primary investigative technique to identify the sources of illegal firearms trafficking to juveniles." J.A. 27-28.

ATF has adopted a multi-tiered policy for the disclosure of information in the Trace Database.

i. Pursuant to FOIA Exemption 7(A), ATF withholds all information in the Trace Database for at least one year from the date of the trace request. J.A. 32-33. ATF's declarant explained that "firearms traces may take many weeks or months to complete, and the [one-year] delay allows law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the FFL's distribution chain. The one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation." J.A. 33.

ii. Nine of the 300-plus data elements in the Trace Database are withheld for five years pursuant to Exemption 7(A). J.A. 34. Those nine elements consist of information identifying the law enforcement agency requesting the trace (code assigned to agency, agency name, agency city, and agency zip code); weapon data (serial number, if the firearm was

involved in multiple sales, and importer name); firearms dealer identification data (license number, or "invalid" dealer number for a source that does not have a federal license); and date of retail purchase. See J.A. 34 n.2, 37. Data in those categories are withheld for five years "because their release, combined with the other FTS data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations." J.A. 34. In addition, the many gun-trafficking investigations conducted by ATF pursuant to projects such as Online LEAD and the YCGII, which are not tied to a particular trace request but rather grow out of analysis of nationwide trace and multiple sales data, "can take two years or longer to develop as firearms are recovered that indicate a pattern of possible violations." J.A. 43.

In ATF's experience, however, trace information "tends to become 'stale' and less important to law enforcement agencies after five years." J.A. 34. That five-year period is also consistent with the statute of limitations for violations of the GCA (see 18 U.S.C. 3282), "which sufficiently reduces the law enforcement interest in the data after that time to tip the balance under FOIA in favor of disclosure." J.A. 34. Thus, ATF has determined that, of the 300 data elements in the Trace Database, "protection of the [nine data elements] for five years strikes the most appropriate balance between public disclosure of as much information as possible and the protection of law enforcement efforts." J.A. 34-35.

Unless ATF is participating in a joint investigation with the enforcement agency that requested a firearm trace, the requesting agency has no law enforcement reason to inform ATF of the progress of its investigation after the tracing process is completed. ATF does not and could not feasibly track the status of the individual investigations that underlie the more than one million traces in the Trace Database. J.A.

24-25, 29. In addition, long-term gun-trafficking investigations, based on computer analysis of the databases, are not tied to the status of the particular case that precipitated the initial trace request and may take years to develop and complete. J.A. 27-28, 43. In ATF's judgment, however, "there is no doubt that many of the over 1.2 million trace results in the FTS relate to open investigations." J.A. 25. Because the data are not "'reasonably segregable' in an open investigation-specific manner, ATF FOIA policy * * * is to provide as much data as possible under the FOIA, but to withhold those data that would * * * reveal the results of ATF's trace before the [requesting] law enforcement agency has had a reasonable opportunity to solve the crime that may be related to the traced firearm," or that would allow suspects to "connect the dots" that law enforcement officials are following in their efforts to detect patterns of illegal firearms trafficking. J.A. 25-26.

iii. Names and addresses of private individuals in the Trace Database, including the locations where traced firearms were recovered, are withheld indefinitely for privacy reasons under FOIA Exemption 7(C). J.A. 51-56. As the government's declarant explained, "[t]he public release of this information could subject the persons named to harassment and stigma." J.A. 54. Although many of the individuals named in the Trace Database may be suspected of criminal activity, others "simply could be innocent third parties in the wrong place at the wrong time." J.A. 55. And "because the agency requesting the trace does not inform ATF of whether possessors and their associates are ever indicted or convicted of any offense, ATF has no way of knowing whether the law enforcement agency requesting the trace believes the possessor or associate to have had any role in the crime." J.A. 54.[6]

[6] The court of appeals' opinion states that "ATF withholds indefinitely the individual names and addresses of all firearm purchasers, manufacturers, dealers and importers in both databases for privacy reasons." Pet. App. 4a. That is incorrect. Although the names and addresses of individual firearms *purchasers* (as well as other private persons) are withheld indefinitely under Exemption 7(C), the agency has not invoked Exemption 7(C) with respect to manufacturers, dealers, or importers. Rather, identifying information concerning those commercial actors is withheld only temporarily, pursuant to Exemption 7(A), and then released. See J.A. 36-39, 41-42.

b. *The Multiple Sales Database* The GCA requires an FFL to submit a report to ATF whenever the FFL sells or otherwise disposes of two or more handguns to an unlicensed person within any five consecutive business days. 18 U.S.C. 923(g)(3)(A); see J.A. 22. ATF's Multiple Sales Database contains information derived from those reports. J.A. 22.[7] Such multiple sales are not unlawful in and of themselves, but they "may indicate illegal trafficking in firearms, and the multiple sales reports are often the starting points for investigations of illegal gun trafficking." *Ibid.* Under FOIA Exemption 7(A), ATF withholds all data in the Multiple Sales Database for a period of two years. J.A. 47. After two years, ATF releases the entire Multiple Sales Database, except for individual names and addresses of retail firearms purchasers, which are withheld indefinitely for privacy reasons pursuant to Exemption 7(C). See J.A. 56.

3. Respondent City of Chicago is engaged in pending state court civil litigation, in which respondent seeks injunctive relief and damages against certain gun manufacturers, distributors, and dealers. Pet. App. 2a.[8] That suit alleges

[7] The Multiple Sales Database includes information pertaining to the purchaser (name, address, and date of birth); weapons information (manufacturer, weapon type, serial number, and caliber); and FFL identifying information (name and address). J.A. 32. ATF reports that, as of November 2002, the Multiple Sales Database contained approximately 700,000 records.

[8] In that action, *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 98-CH-15596 (Cir. Ct., Cook County, Ill.), the City alleges that the defendants

that the defendants' marketing practices have facilitated violations of respondent's firearms ordinances. *Ibid.* In furtherance of its interests in that litigation, the City submitted a FOIA request to ATF for immediate access on CD-ROM to the entire Trace and Multiple Sales Databases. See *ibid.*; Gov't C.A. App. 10, 12-13 (Compl.), 19 (Mar. 3, 2000 demand letter). In accordance with its practice of cooperating with local law enforcement agencies under the GCA, ATF chose to make a discretionary release to respondent of all data related to (a) trace requests submitted by the Chicago Police Department, and (b) multiple-sales purchasers who are residents of Chicago. See Pet. App. 3a-4a; 18 U.S.C. 923(g)(1)(D). However, invoking FOIA Exemptions 6, 7(A), and 7(C), ATF withheld from release under the FOIA various categories of nationwide data for the specified periods of time described above. See pp. 8-11, *supra*.[9]

4. Respondent then brought this action against ATF under the FOIA. The district court granted the City's

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have created a "public nuisance" by marketing firearms in Chicago, where it is essentially illegal to possess any gun. Respondent seeks injunctive relief, as well as compensatory and punitive damages for the costs the City incurs as a result of the presence of illegal guns in Chicago. See Gov't C.A. App. 10, ¶ 5. Respondent apparently believes that obtaining information from ATF regarding nationwide firearm distribution patterns would assist it in establishing the distribution practices of the defendants in its state court civil action. See Pet. App. 20a. The trial court dismissed respondent's state court action for failure to state a claim, but the suit was recently reinstated by an Illinois appellate court. See *City of Chicago* v. *Beretta U.S.A. Corp.*, No. 1-00-3541, 2002 WL 31455180 (Ill. App. Ct. Nov. 4, 2002). On November 25, 2002, the defendant FFLs filed a motion for rehearing in the appellate court and a petition for leave to file an appeal to the Illinois Supreme Court. As a result of those filings, the judgment of the state appellate court is currently stayed.

[9] FOIA Exemption 6, 5 U.S.C. 552(b)(6), authorizes withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 6 is no longer at issue in this case. See note 11, *infra*.

motion for summary judgment and ordered release under the FOIA of the Trace and Multiple Sales Databases. Pet. App. 19a-30a. The court first held that neither Exemption 6 nor Exemption 7(C) authorized the agency's withholding of the names and addresses contained in the ATF files. *Id.* at 23a-25a. The court found that "whatever small privacy interest an individual may have in protecting his identity in connection with the purchase or possession of a weapon is greatly outweighed by the public interest in the disclosure of this information." *Id.* at 24a (citation omitted). The district court also held Exemption 7(A) to be inapplicable, finding that the government had failed to "explain[] specifically how [the requested] information would allow an individual to interfere with an enforcement proceeding." *Id.* at 26a-27a. The court subsequently amended its judgment to require ATF to produce all requested information contained in the Trace and Multiple Sales Databases through the date of production, regardless of when particular trace records were created. Gov't C.A. App. 126-127.[10]

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[10] Contrary to respondent's suggestions (*e.g.*, Br. in Opp. 5, 6-7, 8, 21, 26), the district court's decision did not rest on the resolution of disputed factual issues, nor did the court conduct an evidentiary hearing on the merits of the government's exemption claims. Rather, the evidentiary hearing centered on the discrete issue of "segregability" (see 5 U.S.C. 552(b); Pet. App. 27a-30a): *i.e.*, whether, if some but not all of the requested information was ultimately held to be exempt from compelled disclosure, the government could feasibly segregate and withhold the exempt information, while releasing any data that were found to be non-exempt. Respondent's counsel stated at the outset that "the scope of the hearing really is to look at whether or not it is feasible and practicable for the Government to make certain deletions assuming the exemptions apply." J.A. 112-113. Although respondent's counsel was occasionally permitted (over the government's objection) to pose questions that appeared to go to the merits of the exemption claims (see, *e.g.*, J.A. 132-134), the focus remained on the severability question. Respondent's post-hearing memorandum noted that "a two-day hearing was held where the parties presented evidence *on the narrow issue of segregability*." R. 47, at 2 (emphasis

5. The Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1a-16a.

a. The court of appeals held that Exemption 7(A) is inapplicable, stating that "ATF could not identify a single concrete law enforcement proceeding that could be endangered by the release of this information." Pet. App. 9a. The court rejected ATF's determination that if the databases were released, an individual could use the withheld information to deduce that a particular investigation is underway. The court found that ATF had identified no "single instance in which information has been pieced together in this type of scenario." *Id.* at 8a. It also rejected ATF's evidentiary showing that release of the data could identify and thereby threaten the safety of law enforcement agents, result in witness intimidation, or otherwise interfere with an ongoing investigation, stating that "ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation." *Ibid.*

b. The court of appeals also held that the names and addresses of individuals contained in the databases are not protected from public disclosure under FOIA Exemption 7(C). Pet. App. 13a-15a. The court recognized that application of Exemption 7(C) requires a balancing of the privacy interest implicated by release against the public interest in disclosure. *Id.* at 13a. With respect to the privacy interest involved, however, the court "agree[d] with the district court that the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction." *Id.* at

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added). David Benton, ATF's primary declarant regarding the justifications for the agency's withholding practices, did not testify at the hearing. The district court issued no findings of fact bearing on the applicability of Exemption 7(A) or 7(C); it granted summary judgment to respondent. See Pet. App. 19a, 30a.

13a-14a. The court of appeals further held that any "minimal privacy interest" that might be implicated is "substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Id.* at 14a.

c. The government filed a petition for rehearing en banc. On July 25, 2002, the court of appeals denied that petition. Pet. App. 17a-18a. In the order denying rehearing, the court amended its prior opinion to insert, after the first full paragraph on page eight of the slip opinion (*i.e.*, the first full paragraph on Pet. App. 9a), the following paragraph:

> We are not asking ATF to identify a *specific* instance in which the release of information has interfered with enforcement proceedings—we concede that this would be impossible, in light of the fact that this type of information has never before been released, and until it has, it cannot be misused. Moreover, *Robbins Tire* makes clear that a showing of specific instances of interference is not required. 437 U.S. at 236. But this does not end our inquiry. ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

Id. at 17a-18a.

SUMMARY OF ARGUMENT

I. Because the release of individual names and addresses contained in the Trace and Multiple Sales Databases would substantially intrude upon the individuals' privacy interests, without assisting the public in evaluating ATF's own conduct, those names and addresses are protected from compelled disclosure by FOIA Exemption 7(C).

A. It is well established that release of individual names and addresses in government files implicates substantial privacy interests that must be weighed in the Exemption 7(C) balance. The court of appeals erred in discounting that privacy interest based on the reporting requirements under the Gun Control Act (GCA) that apply to commercial transactions in firearms. Reporting of personal information to the government cannot reasonably be equated with disclosure of the same information to the public at large. Moreover, the GCA strictly prohibits state and local officials from retaining or disseminating data concerning multiple sales of firearms, see 18 U.S.C. 923(g)(3)(B), thus making clear that Congress did not contemplate indiscriminate public release of that information.

With respect to the Trace Database, the court of appeals' minimization of the privacy interest implicated by disclosure of individual names and addresses is even more misguided. Release of names and addresses within that database would override the individuals' substantial and well-recognized interest in avoiding public association with a criminal investigation. The court of appeals was also incorrect in stating that the names of all firearms purchasers must be reported to federal, state, and local authorities; in fact, that requirement applies only to multiple sales of handguns. In addition, many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all, and therefore cannot be said to have voluntarily subjected themselves to the regulatory scheme governing commercial firearms transactions. The government's declarant explained in detail how release of the names and addresses in the Trace Database could be expected to impair the privacy of persons who had never been adjudged guilty of any wrongdoing.

B. Release of the individual names and addresses would not meaningfully assist the public in evaluating ATF's conduct. Although the court of appeals repeatedly referred to

respondent's interests in enforcing its gun ordinances and prosecuting its state-court lawsuit, those interests are irrelevant as a matter of law to the Exemption 7(C) balance. And while the court of appeals also referred to the public interest in monitoring ATF's performance of its statutory duties, it did not explain how release of the individual names and addresses in the ATF databases would shed light on the agency's enforcement of the GCA.

C. Given the weighty privacy interests implicated by release of the names and addresses contained in the Trace and Multiple Sales Databases, compelled disclosure could be justified (if at all) only by an overriding public interest. Because respondent has failed to identify any meaningful public interest in disclosure that is relevant to the Exemption 7(C) analysis, the balance in this case tips heavily against disclosure.

II. The court of appeals erred in holding that none of the information contained in the Trace Database is protected by Exemption 7(A).

A. In *Robbins Tire*, this Court held that an agency may invoke Exemption 7(A) based on a generic or categorical determination that release of particular types of records would be likely, as a general matter, to cause interference with law enforcement proceedings. FOIA amendments enacted in 1986 reinforced the validity of a categorical, pragmatic approach to applying Exemption 7(A). The need for a categorical approach is particularly evident in this case, since the vast size of the Trace Database makes it infeasible for the agency to identify, on a trace-by-trace basis, the specific data that could safely be disclosed to the public without compromising open or reasonably anticipated law enforcement investigations.

B. Every item of data within the Trace Database corresponds to what was at the time of the trace request an open criminal investigation. Each of those investigations, more-

over, involved the suspected use of a firearm in connection with criminal activity. ATF therefore reasonably concluded that it should exercise caution before publicly releasing information contained in the database. ATF has not pursued a blanket policy of nondisclosure, however, but has instead implemented a nuanced approach that advances FOIA's open government objectives while safeguarding law enforcement efforts.

C. ATF supported its withholding decisions with a comprehensive and highly detailed declaration executed by an agency official with long experience in law enforcement firearm tracing and FOIA implementation. The declaration identified a range of circumstances in which the premature release of unredacted information about each of more than one million firearm traces could threaten the integrity of law enforcement investigations by, *inter alia*, causing destruction of evidence, flight of suspects, chilling and intimidation of witnesses, and threats to the safety of law enforcement personnel and confidential informants. Immediate disclosure of trace information could reasonably be expected to cause interference not only with the individual law enforcement investigations that precipitated the various traces, but also with ATF's efforts to employ computer analysis of nationwide trace data to identify patterns of unlawful activity. Particularly given its vast size and computerized format, immediate disclosure of the entire Trace Database would result in substantial harms to law enforcement. Compelled disclosure could also be expected to deter other enforcement agencies from requesting firearm traces in the future, and to discourage the creation and use of similar law enforcement databases by ATF and other federal agencies.

D. The court of appeals offered no persuasive justification for rejecting the agency's evidentiary showing. The court's initial opinion stressed ATF's failure to identify (a) specific instances in which release of similar information had previously caused interference with law enforcement activities, or (b) specific current investigations that would be impeded by disclosure of the requested data. The court subsequently acknowledged that the agency was not required to identify specific instances of interference with law enforcement, and that ATF could not be expected to identify prior instances of interference in any event because ATF had not released the requested information in the past. The court identified no other purported deficiencies in ATF's evidence, however, beyond the conclusory assertion that the agency's predictions of harm were "far-fetched" rather than "reasonable."

ARGUMENT

I. THE INDIVIDUAL NAMES AND ADDRESSES CONTAINED IN THE MULTIPLE SALES AND TRACE DATABASES ARE EXEMPT FROM COMPELLED DISCLOSURE UNDER FOIA EXEMPTION 7(C)

FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C), shields from compelled disclosure "records or information compiled for law enforcement purposes" to the extent that release of such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." It is undisputed that the records in this case satisfy Exemption 7's threshold requirement—*i.e.*, that the Trace and Multiple Sales Databases were "compiled for law enforcement purposes." To determine whether release of particular law enforcement records would cause an "unwarranted invasion of personal privacy" within the meaning of Exemption 7(C), a court must balance the privacy interest that disclosure could be expected to impair against the public interest, if any, that release of the request records could be expected to advance. See p. 4, *supra*.

In the present case, release of the individual names and addresses contained in the relevant databases would sub-

stantially intrude upon the privacy interests of hundreds of thousands of individuals, without meaningfully serving any public interest that is relevant to the Exemption 7(C) balance. The court of appeals therefore erred in ordering that those names and addresses be released.[11]

A. Release Of Individual Names And Addresses In The Multiple Sales And Trace Databases Would Substantially Intrude Upon Legitimate Privacy Interests

This Court's "decisions establish that whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made." *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989). Thus, in conducting the Exemption 7(C) balancing in this case, the courts below were required to consider the effect on privacy that could reasonably be expected to result if the names and addresses in

[11] The court of appeals also held that individual names and addresses contained in the two databases are not protected from compelled disclosure by FOIA Exemption 6. See Pet. App. 10a-13a. The government has not sought review of that holding because it has no practical impact on the disposition of this case. See Pet. 11-12 n.7. Exemption 6 covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Exemption 7(C) covers "records or information compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Exemption 7(C), which contains the phrase "could reasonably be expected" and refers to an "unwarranted" rather than a "clearly unwarranted" invasion of privacy, is thus "more protective of privacy than Exemption 6." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 497 n.6 (1994); see *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989). Because there is no dispute that the records in this case satisfy Exemption 7's threshold requirement, any information contained in the Trace and Multiple Sales Databases that is covered by Exemption 6 would necessarily be protected by Exemption 7(C) as well.

the ATF databases were made available to the general public—not the (presumably smaller) impact of disclosure to respondent alone.[12]

This Court and the courts of appeals have repeatedly recognized that disclosure pursuant to the FOIA of individual names and addresses in the possession of a federal agency implicates legitimate privacy interests that must be weighed in the balance under FOIA's privacy exemptions. See *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994); *United States Dep't of the Navy* v. *FLRA*, 975 F.2d 348, 353 (7th Cir. 1992); *National Ass'n of Retired Fed. Employees* v. *Horner*, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990); *FLRA* v. *United States Dep't of Defense*, 977 F.2d 545, 549 (11th Cir. 1992). The court of appeals did not specifically address that extensive line of authority. The court appeared to conclude, however, that the individuals whose names and/or addresses are included in the Trace and Multiple Sales Databases have in effect waived their claim to privacy by engaging in regulated firearms transactions. Thus, in assessing (and almost entirely discounting) the privacy interests threatened by the blanket disclosure of hundreds of thousands of individual

[12] This does not mean that respondent's governmental status, and its corresponding interest in obtaining law enforcement data, have had no bearing on ATF's overall disclosure decisions. ATF released to respondent a substantial volume of unredacted data pertaining to firearms crimes and multiple purchasers in Chicago, as a discretionary release to local law enforcement pursuant to the GCA. See p. 12, *supra*. Respondent's governmental status and interests are irrelevant, however, to its claim of entitlement to agency records *under the FOIA*. Yet the consequence of the Seventh Circuit's decision is to require the immediate *public* disclosure of vast amounts of private data on a *nationwide* basis, far beyond the reach of respondent's governmental jurisdiction and notwithstanding the substantial countervailing privacy and law enforcement interests of individuals and law enforcement agencies in other jurisdictions.

names and addresses contained in the Trace and Multiple Sales Databases, the court of appeals reasoned that

> the release of the requested names and addresses does not raise any legitimate privacy concerns because the purchase of a firearm is not a private transaction. The Gun Control Act requires that a transaction for the sale of a firearm be recorded and every dealer is required to make business records available to investigation. Again, every purchaser of a firearm is on notice that their name and address must be reported to state and local authorities and ATF. As a result, there can be no expectation of privacy in the requested names and addresses.

Pet. App. 13a-14a (citations omitted). With respect to each of the two databases at issue in this case, the court of appeals' analysis of the relevant privacy interests is badly flawed.

1. ***The Multiple Sales Database***

a. The GCA requires each FFL to "prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling two or more, to an unlicensed person." 18 U.S.C. 923(g)(3)(A). The multiple sales report must be forwarded to ATF and to "the department of State police or State law enforcement agency of the State or local law enforcement agency of the local jurisdiction in which the sale or other disposition took place." 18 U.S.C. 923(g)(3)(A). Thus, with respect to individuals who engage in multiple purchases of firearms covered by Section 923(g)(3)(A), the court of appeals was factually correct in stating that such persons are "on notice that their name and address must be reported to state and local authorities and ATF." Pet. App. 14a.

It by no means follows, however, that release of the names and addresses pursuant to the FOIA would impair no legitimate privacy interest. Reporting of personal information *to the government* is far different from disclosure of the same information to the public at large. Indeed, taken to its logical conclusion, the court of appeals' approach would render Exemption 7(C) a practical nullity. *Every* item of federal law enforcement data for which Exemption 7(C) is invoked is by definition known to some agency of the federal government; otherwise it would not appear in records responsive to a FOIA request. The government's possession of particular data may prevent the information from being *entirely* private or confidential, but indiscriminate release of the data to the general public nevertheless implicates substantial privacy interests.

In *Reporters Committee*, this Court held that individuals have a substantial privacy interest in preventing public release of their "rap sheets," even though information about the various events summarized on the rap sheets had already been made available to the public in some manner. See 489 U.S. at 762-764. The Court explained that, with respect to the practical impact on privacy that different forms of release might entail, "there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764; see *Dep't of Defense* v. *FLRA*, 510 U.S. at 500. *A fortiori*, disclosure of a firearms purchaser's name and address to a limited class of government officials who have access to *nonpublic* files does not negate the individual's privacy interest in avoiding release of that information to the general public pursuant to the FOIA. Cf. *Reporters Committee*, 489 U.S. at 770 ("The right to collect and use [personal] data for public purposes is typically accompanied by a concomitant statu-

tory or regulatory duty to avoid unwarranted disclosures.") (quoting *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977)).

b. Consistent with that observation in *Reporters Committee*, the GCA itself—the same statutory regime that places multiple handgun purchasers on notice that their names will be reported to ATF—reflects Congress's determination that data regarding multiple sales of firearms should *not* be routinely disclosed to the public at large. Under 18 U.S.C. 923(g)(3)(B), state and local law enforcement officials are prohibited from disclosing multiple sales reports or their contents "to any person or entity," and they are required to "destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received," unless the form relates to a purchaser whose possession of a firearm is prohibited by 18 U.S.C. 922(g) or (n). Section 923(g)(3)(B) also requires state and local authorities to certify to the Attorney General every six months that no improper disclosures have been made and that all forms and records of their contents have been destroyed. In enacting Section 923(g)(3)(B), Congress plainly rejected any notion that the provision of personal data to a limited set of law enforcement officials eliminates the individual's privacy interest in avoiding widespread public disclosure.

The statutory prohibition on the retention and release of multiple sales records applies by its terms to state and local officials, not to ATF. ATF thus retains discretion to preserve the records (as in the Multiple Sales Database) and to utilize them in ways that ATF reasonably concludes will further legitimate law enforcement objectives. Section 923(g)(3)(B) makes clear, however, that Congress did not contemplate release of those records to anyone—much less to the general public—in circumstances where ATF perceives no law enforcement interest in their disclosure. Indeed, Section 923(g)(3)(B)'s strict prohibition on retention

and release of multiple sales information by state and local authorities would be wholly pointless if any member of the public could obtain the same data from ATF pursuant to the FOIA. At the very least, Section 923(g)(3)(B) makes clear that Congress regarded multiple purchasers of firearms as having a substantial privacy interest in avoiding disclosure of their identities other than to a limited set of law enforcement officials.

2. ***The Trace Database***

With respect to the Trace Database, the court of appeals' minimization of the privacy interests implicated by disclosure of individual names and addresses is even more misguided.

a. Under the GCA, a request for an ATF firearm trace must be premised on the existence of a "bona fide criminal investigation." See 18 U.S.C. 923(g)(1)(B)(iii); 18 U.S.C. 923(g)(7). Release of names and addresses within the Trace Database would thus publicly link identified individuals with the criminal investigations that originally gave rise to the pertinent trace requests. With respect to that database, the relevant privacy interest is therefore that of *all* private citizens, including both firearms purchasers and others (see pp. 26-27, *infra*), in avoiding public disclosure of their names and addresses *in connection with a criminal law enforcement investigation.*

"Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation." *Landano* v. *United States Dep't of Justice*, 956 F.2d 422, 426 (3d Cir.) (citing cases), cert. denied, 506 U.S. 868 (1992). Those decisions reflect a longstanding judicial consensus that "the mention of an individual's name in a law enforcement

file will engender comment and speculation and carries a stigmatizing connotation." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990) (citation omitted). That privacy interest exists regardless of whether the individual named in the file is identified as a suspected wrongdoer. See, *e.g.*, *ibid.* ("[E]xemption 7(C) takes particular note of the strong interest of individuals, whether they be suspects, witnesses, or investigators, in not being associated unwarrantedly with alleged criminal activity") (citation and internal quotation marks omitted); *Manna* v. *United States Dep't of Justice*, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, 516 U.S. 975 (1995); *Neely* v. *FBI*, 208 F.3d 461, 464-465 (4th Cir. 2000); *Burge* v. *Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991).

b. Moreover, with respect to the Trace Database, the premise of the court of appeals' privacy analysis—*i.e.*, that firearms purchasers are "on notice that their name and address must be reported to state and local authorities and ATF," Pet. App. 14a—is incorrect. Although FFLs are required to report to ATF the names and addresses of certain *multiple* purchasers (*i.e.*, persons who have bought two or more handguns within five business days), no comparable reporting requirement applies to firearms purchasers generally. To the contrary, the GCA specifically precludes ATF from imposing any system for the registration of firearms, firearms owners, or firearms transactions or dispositions. 18 U.S.C. 926(a); see Pet. App. 63a-64a.

c. The court of appeals' analysis also ignores the fact that many of the individuals whose names and addresses appear in the Trace Database are not firearms purchasers at all. Rather, they are (for example) associates of the last known possessor of a traced weapon, or persons who resided at an address where a hidden or discarded firearm was found. Because such persons cannot be said to have voluntarily subjected themselves to the GCA's regulatory regime governing commercial firearms transactions, the court of appeals had

no basis for its apparent premise, based on that regulatory scheme, that those individuals had surrendered their expectations of privacy in their names and addresses.

d. Although a firearm trace must be premised on the existence of a bona fide criminal investigation, the Trace Database contains the names and addresses of many individuals who have not been adjudged guilty of any wrongdoing and may not even be the subjects of investigative interest. The government's declarant explained in detail how release of the names and addresses in that database could impair the privacy of innocent persons. See J.A. 52-56. For example, the last known possessor of a traced firearm "ultimately may be exonerated in the course of a criminal investigation," yet "the mere mentioning in a law enforcement file may subject the one-time suspect to harassment and embarrassment." J.A. 54. Public identification of a person found with the gun's last known possessor "could lead to harassment and intimidation by those who would prefer the associate not cooperate with investigators or to false allegations of the person's guilt." *Ibid.* If the tracing process is successful, it will identify the first retail purchaser of the traced firearm (see pp. 6-7, *supra*); yet that person may have long since relinquished ownership of the weapon and may have no connection to the underlying crime. See J.A. 55 (government's declarant explains that "a person who purchased a firearm legally in 1993 and sold the gun in 1995 would appear in the Trace Database Sub-Module as a purchaser, even if the firearm were recovered in a crime and submitted for a trace in 2000"). "The association of such an individual with a crime involving a firearm, which the public may infer from the data, could lead to embarrassment and stigma for the purchaser." *Ibid.*; compare *United States Dep't of State* v. *Ray*, 502 U.S. 164, 176 (1991) (identification of returned refugees who cooperated with State Department investigation "could subject them or their families to em-

barrassment in their social and community relationships") (internal quotation marks omitted).

B. Release Of Individual Names And Addresses Contained In The Trace And Multiple Sales Databases Would Not Meaningfully Advance The Public Interest In Evaluating ATF's Conduct

This Court has made clear that "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 (brackets, citation, and internal quotation marks omitted); see *Bibles*, 519 U.S. at 355-356. As the Court explained in *Reporters Committee*, the purpose of the FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." 489 U.S. at 773. Thus, even where a FOIA requester's interest in obtaining federal records is legitimate in and of itself—as is undoubtedly true of (for example) a labor union's desire "to communicate more effectively with employees," *Dep't of Defense* v. *FLRA*, 510 U.S. at 497—that interest is irrelevant to the Exemption 7(C) analysis unless disclosure of the information at issue would meaningfully assist the public in evaluating the conduct of the federal government, see *ibid.*

The court of appeals' assessment of the public interest ostensibly served by disclosure of individual names and addresses in this case cannot be reconciled with the foregoing principles. The court of appeals acknowledged the settled rule that "the City's particular interests in enforcing its gun ordinances do not weigh into the equation under Exemption 7(C)." Pet. App. 14a. But the court nevertheless repeatedly invoked those interests in the course of its analysis. Indeed, the court introduced and summarized its assessment of the

Exemption 7(C) balance with the statement that any privacy interest implicated by release of individual names and addresses "is substantially outweighed by the public's interest in allowing the City to further its suit in the state court." *Ibid.*; see *id.* at 15a (noting "the City's interests in preventing illegal handgun trafficking and preserving the integrity of Chicago's gun control ordinances"); *ibid.* (observing that "[t]here is a strong public policy in facilitating the analysis of national patterns of gun trafficking and enabling the City to enforce its criminal ordinances").[13] A similar error in the assessment of the public interest under FOIA by the Ninth Circuit resulted in summary reversal by this Court in *Bibles*, 519 U.S. at 355-356.

2. The court of appeals also stated that "[i]nherent in [respondent's] request for the records is the public's interest in ATF's performance of its statutory duties of tracking, investigating and prosecuting illegal gun trafficking." Pet. App. 14a. The court of appeals made no effort, however, to explain *how* disclosure of individual names and addresses of private citizens could cast light on ATF's performance of its statutory responsibilities. Particularly in light of the substantial privacy interests that would be implicated by disclosure (see pp. 20-28, *supra*), it was incumbent on the court of appeals not simply to allude to the public interest in

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[13] Similarly, the district court characterized respondent's FOIA request as "an effort to gain information regarding nationwide firearm distribution patterns" for purposes of the City's state-court suit against gun manufacturers, distributors, and dealers. Pet. App. 20a. The district court held that the privacy interest of individuals in avoiding dissemination of their names and addresses was outweighed by respondent's "interest in maintaining the integrity of its ordinances, as well as its interest in controlling gun trafficking into Chicago." *Id.* at 24a. The district court also alluded to "the general public interest in facilitating the analysis of gun trafficking patterns nationwide." *Ibid.* That is not a cognizable public interest under Exemption 7(C), however, because it does not focus on the federal agency's conduct.

evaluating ATF's conduct, but to explain how dissemination of the requested information would "contribut[e] significantly" to such an evaluation. *Dep't of Defense* v. *FLRA*, 510 U.S. at 495; cf. *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. 1989) (when a court balances private and public interests under Exemption 7(C), "merely stating that [a public] interest exists in the abstract is not enough; rather, the court should * * * analyze[] how that interest would be served by compelling disclosure" of specific "identifying information"); *Senate of the Commonwealth of P.R.* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.) (requester's "general interest in 'getting to the bottom' of" a particular controversy did not outweigh privacy interests where withheld information would link individuals with a law enforcement investigation).[14]

3. Respondent has contended (Br. in Opp. 16) that its declarant, Gerald A. Nunziato, provided "uncontroverted testimony" that disclosure of "individual names" in the Trace and Multiple Sales Databases could assist the public in evaluating ATF's efforts to enforce federal gun laws. The primary thrust of the cited testimony, however, was that identification of gun *dealers* could aid the public in assessing

[14] By contrast, information that *does* shed light on a wide range of ATF programs is already publicly available. See Bureau of Alcohol, Tobacco and Firearms, *Firearms and Explosives Publications* (visited Jan. 2, 2002) <http://www.atf.treas.gov/pub/index.htm#Firearms>. ATF's comprehensive 2000 Crime Gun Trace Report is also available. See Bureau of Alcohol, Tobacco and Firearms, *2000 Crime Gun Trace Report* (visited Jan. 2, 2002) <http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf>. If alternative means of evaluating a federal agency's conduct are available, the public interest in disclosure of information that implicates privacy interests may be discounted accordingly. See *United States Dep't of Def. Dep't of Military Affairs* v. *FLRA*, 964 F.2d 26, 29-30 (D.C. Cir. 1992).

ATF's conduct. See J.A. 101, 102.[15] Although all identifying information concerning firearms dealers is withheld temporarily pursuant to Exemption 7(A), see J.A. 41-44, ATF has not invoked Exemption 7(C) with respect to that category of data, see J.A. 49-56. Nunziato's testimony is therefore largely irrelevant to the Exemption 7(C) issue presented here.

Respondent has also contended (Br. in Opp. 17) that the court of appeals properly relied on the City's interest in enforcing its gun laws and litigating its state-court lawsuit because, in a general sense, assisting state and local enforcement efforts is part of ATF's mission. ATF's assistance of state and local governments has never included releasing sensitive law enforcement information to the public at large, however, and state and local law enforcement would be seriously undermined by such disclosures. See pp. 34-50, *infra*. Moreover, respondent has not explained (nor did the courts below) how public disclosure of individual names and addresses could cast light on the agency's conduct in assisting state and local governments. The Benton Declaration (J.A. 18-58) clearly sets forth ATF's disclosure policies with respect to the Trace and Multiple Sales Databases, including ATF's reasons for withholding the individual names and addresses contained therein. Release of the names and addresses themselves could not assist the public in any appre-

[15] Nunziato did state, in his second supplemental declaration, that "the City of Chicago has traced over 60,000 crime-guns and has identified over 80,000 names of individuals involved with these crime-guns. The Chicago data could be analyzed to determine if ATF is actively enforcing the Federal firearms laws and regulations." J.A. 102. Nunziato did not explain, however, *how* the names and addresses of purchasers and third parties identified in the Trace and Multiple Sales Databases could be used to evaluate ATF's enforcement of federal gun laws. Moreover, ATF provided respondent with the relevant "Chicago data" as a discretionary release to a local law enforcement agency for its own purposes pursuant to the GCA. See p. 12, *supra*.

ciable way to determine whether ATF has adequately supported local authorities, or otherwise to evaluate the agency's performance of its responsibilities. Compare *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 ("Disclosure of the [requested] addresses might allow the unions to communicate more effectively with employees, but it would not appreciably further the citizens' right to be informed about what their government is up to.") (internal quotation marks omitted).

C. The Privacy Interests That Would Be Invaded By Release Of The Requested Names And Addresses Substantially Outweigh Any Public Interest In Disclosure That Is Relevant To The Exemption 7(C) Balance

This Court's observation in *Reporters Committee* that "in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen," 489 U.S. at 774-775, remains true today. Although names and addresses of private individuals are not categorically exempted from release under the FOIA, compelled disclosure of such information could be appropriate only if disclosure would serve some especially weighty public interest. That is particularly so with respect to law enforcement records, since Exemption 7(C) is "more protective of privacy than Exemption 6" (which applies to federal agency records generally). *Dep't of Defense* v. *FLRA*, 510 U.S. at 497 n.6; see note 11, *supra*. Indeed, the District of Columbia Circuit has "h[e]ld categorically that, unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); compare *Dep't of State* v. *Ray*, 502 U.S. at 179 (rejecting asserted public interest in ascertaining the veracity

of interview reports, because government records and official conduct are generally accorded a presumption of regularity and there was no evidence in the record impugning the veracity of the interview reports). Respondent has not even alleged unlawful agency conduct here, let alone submitted "compelling evidence" in support of such an allegation.

The Court need not decide in this case whether the rule announced in *SafeCard* (or a rule requiring a comparably weighty showing of a public interest) is appropriate as a categorical matter for all cases in which Exemption 7(C) is invoked.[16] In this case, disclosure of individual names and addresses contained in the Trace and Multiple Sales Databases would substantially intrude upon those individuals' privacy, not only because release under the FOIA of the names and addresses of private citizens *always* implicates significant privacy interests, but also because (a) the GCA reflects Congress's particular determination that the names of multiple handgun purchasers, which are contained in the Multiple Sales Database, should not indiscriminately be disclosed to the public (see pp. 24-25, *supra*), and (b) individuals have long been recognized to have an especially strong interest in avoiding the sort of public association with a criminal investigation that disclosure of information in the Trace Database would entail (see p. 25-26, *supra*). At least in these circumstances, compelled disclosure of the requested names and addresses in the two databases at issue here could be justified (if at all) only by an overriding public

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[16] In its response to the certiorari petition in *Oguaju* v. *United States Marshals Serv.*, No. 02-5651, the government argues (at 4-5) that a requirement that the FOIA requester produce substantial evidence of illegal activity or make a comparably heightened showing to overcome privacy interests under Exemption 7(C) is especially appropriate where the public interest in disclosure involves an allegation of governmental misconduct or an impermissible departure from established rules or practices.

interest comparable to the need to address factually supported claims of government illegality. Far from establishing such an overriding justification for release of the names and addresses, however, neither respondent nor the courts below have identified *any* meaningful public interest in disclosure that is relevant to the Exemption 7(C) analysis. ATF therefore properly withheld that information under Exemption 7(C).

II. ATF'S WITHHOLDING POLICIES WITH RESPECT TO THE TRACE DATABASE ARE APPROPRIATE UNDER EXEMPTION 7(A)

The court of appeals also erred in holding that *none* of the information contained in the Trace Database is protected by Exemption 7(A), which shields law enforcement records from compelled disclosure where release of such records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A).[17] Public disclosure of that database would reveal, with respect to each of more than one million investigations, a variety of sensitive law enforcement information. In invoking Exemption 7(A) in this case, the government offered a lengthy and detailed declaration that described the ways in which premature public disclosure of different categories of data could be expected to result in interference with law enforcement proceedings. See note 4, *supra*. The court of appeals ultimately found Exemption 7(A) to be inapplicable, based solely on its conclusory assertion that ATF's considered judgments concerning the future harm that could reasonably be expected to result from disclosure of a database—judgments based on substantial law enforcement expertise and the accumulated experience of hundreds of daily interactions between ATF

[17] The government has not sought review of the court of appeals' holding that information contained in the Multiple Sales Database is not protected by Exemption 7(A). See Pet. 9 n.6.

and other law enforcement agencies—"are not *reasonable*" but are instead "only far-fetched hypothetical scenarios." Pet. App. 18a. The court's decision is profoundly misguided and threatens substantial harm to law enforcement.[18]

A. The Government May Establish The Applicability Of Exemption 7(A) By Demonstrating That Release Of Information Within Particular Categories Could Reasonably Be Expected, As A General Matter, To Cause Interference With Law Enforcement Proceedings

In *Robbins Tire*, this Court held that an agency, in invoking Exemption 7(A), need not prove that release of each specific record that is the subject of a FOIA request would interfere with the individual law enforcement proceeding to which those records are connected. 437 U.S. at 236-238. Rather, the agency may employ "generic determinations" and may satisfy its burden under Exemption 7(A)

[18] The apparent effect of the court of appeals' decision is to require immediate release of virtually the entire Trace Database. The court appears to have accepted respondent's representation that "any highly sensitive traces are coded and were not included in the City's FOIA requests." Pet. App. 9a. The court's statement refers to a "do not contact" code that a requesting law enforcement agency may include in its trace request. That code alerts ATF that in conducting the trace it should not contact a particular retail dealer to advise that a firearm he recently sold is being traced because, *inter alia*, the dealer may be suspected of being involved in criminal activity. See 01/31/01 Tr. 158-159. ATF has informed this Office, however, that "do not contact" traces are relatively rare, constituting approximately one percent of all traces. And, contrary to the court of appeals' statement that "any highly sensitive traces are coded," nothing in the record suggests that the "do not contact" traces as a group are more sensitive from a public disclosure perspective than other firearm traces (including traces related to homicides and other violent crimes in which the dealer is not a suspect). Thus, exclusion of data regarding "do not contact" traces from the disclosure obligation imposed by the court of appeals would not significantly ameliorate the practical harms that would be caused by disclosure of the requested data.

by demonstrating "that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* 'interfere with enforcement proceedings.'" *Id.* at 236 (emphasis added).

At the time of the Court's decision in *Robbins Tire*, Exemption 7(A) applied to law enforcement records where release "would * * * interfere with enforcement proceedings." 437 U.S. at 223. The subsequent enactment of the Freedom of Information Reform Act of 1986 (Reform Act), Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48, reinforced the validity of a categorical, pragmatic approach to applying Exemption 7(A). The Reform Act amended Exemption 7(A) to cover law enforcement records the release of which "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A), thereby easing the government's burden. As the legislative history explains, that change "recognizes the lack of certainty in attempting to predict harm" and thus requires only "a standard of reasonableness in that process, based on an objective test." S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983); see *Reporters Committee*, 489 U.S. at 778 n.22 (explaining that the parallel amendment to Exemption 7(C) "amply supports a categorical approach to the balance of private and public interests" under that exemption).[19] Under the categorical

[19] The courts of appeals have repeatedly recognized that the Reform Act effectively broadened the coverage of Exemption 7(A) and reinforces the need for a pragmatic approach. See, *e.g.*, *Manna*, 51 F.3d at 1164 n.5 (Congress amended Exemption 7(A) to "relax significantly the standard for demonstrating interference"); *Alyeska Pipeline Serv. Co.* v. *EPA*, 856 F.2d 309, 311 n.18 (D.C. Cir. 1988) (trial court, in relying on pre-amendment version of Exemption 7(A), improperly "required EPA to meet a higher standard than FOIA now demands"); *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987) ("[T]he drift of the changes is to ease—rather than to increase—the government's burden in respect to Exemption 7(A).").

approach permitted under Exemption 7(A), the agency satisfies its burden of justifying withholding if it "trace[s] a rational link" between the nature of the requested documents and the interference with enforcement proceedings that could be expected to result from disclosure. *Crooker* v. *BATF*, 789 F.2d 64, 67 (D.C. Cir. 1986) (R.B. Ginsburg, J.).

The need for such a categorical approach is particularly evident in this case. As the government's declaration explains, the Trace Database contains the results of more than one million firearm traces. Pet. App. 37a. It is obviously infeasible for ATF to identify, on a trace-by-trace basis, the specific data that could safely be disclosed to the public without compromising open law enforcement investigations. Moreover, law enforcement officials are often not aware of all of the possible implications of trace information at the time of the trace request. In processing respondent's FOIA request, the agency therefore relied of necessity on reasonable generalizations concerning the categories of information for which disclosure would and would not be appropriate. Cf. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989) ("This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of the [FOIA].").

B. In Processing Respondent's Request For Information Contained In The Trace Database, ATF Sought To Prevent Disruption Of Ongoing Law Enforcement Investigations While Respecting FOIA's Open Government Objectives

Under the GCA, ATF is authorized to trace the prior ownership of individual firearms only in connection with a "bona fide criminal investigation." See p. 25, *supra*. The "vast majority" of trace requests originate with law enforcement agencies other than ATF. J.A. 24. As ATF's declarant explained, "it is a standard operational security practice in the law enforcement community that shared in-

vestigative information concerning a recent crime should not be disclosed without the specific authorization of the original investigating agency where disclosure could compromise an investigation or reveal the identities of law enforcement personnel or third parties." J.A. 28-29.

Because ATF is not typically informed when the requesting agency has closed its investigation in a particular instance, J.A. 24-25, it must employ reasonable generalizations to determine how long various categories of data must be withheld in order to avoid disruption of ongoing enforcement proceedings. The starting (and most fundamental) point in considering the application of Exemption 7(A) in this case, however, is that *every* item of data within the Trace Database corresponds to what was at the time of the trace request an open criminal investigation. With respect to each of more than one million traces, disclosure of that database would reveal such sensitive information as the fact that a firearm trace was requested; the identity of the law enforcement agency requesting the trace; the serial number and specifications of a firearm believed to have been involved in a crime; the names of the firearm's last possessor and any persons with him at the time law enforcement personnel obtained the gun; and the date and location of the firearm's recovery. And because each trace is premised on the requesting agency's suspicion of criminal activity involving a *firearm*, the danger that any efforts to disrupt the investigation might take a violent form is readily apparent. Given those facts, and given the uncertainty regarding which investigations remain open at the time of a particular FOIA request, "ATF must be extremely cautious in disclosing law enforcement data from the [Trace Database] to members of the public under the FOIA." J.A. 25.[20]

[20] On July 15, 2002, the House Committee on Appropriations expressed similar concerns in reporting out a bill that would prohibit the use of appropriated funds to disclose, pursuant to the FOIA, any data from the Trace Database or the Multiple Sales Database other than data ATF traditionally has disclosed pursuant to its established FOIA policy:

> The Committee is concerned that certain law enforcement databases may be subject to public release under the Freedom of Information Act (FOIA). As a result, information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases. What is a greater concern is that such release could be accomplished on a comprehensive basis, making all such data available to the public. The need to maintain these databases on a limited confidential basis that has been in place at ATF for several years for tracing records derives from the long-term nature of criminal investigations. In addition to jeopardizing criminal investigations and officer safety, such information, once released, might easily be disseminated through the Internet. This would not only pose a risk to law enforcement and homeland security, but also to the privacy of innocent citizens. The Committee therefore includes language (Section 642) ensuring that no appropriated funds may be available to ATF to take any action under the FOIA with respect to such law enforcement records, except that disclosure of information collected or maintained under 18 U.S.C. 846(b), 923(3) or 923(g)(7) or from Federal, State, local or foreign law enforcement in connection with arson or explosives incidents or the tracing of a firearm may continue in accordance with long standing agency practice.

H.R. Rep. No. 575, 107th Cong., 2d Sess. 20 (2002) (to accompany H.R. 5120). On July 24, 2002, the Treasury Appropriations bill and Conference Report on H.R. 5120 were passed by the House of Representatives. 148 Cong. Rec. H5352-03 (daily ed. July 24, 2002).

Notwithstanding the sensitivity of the information contained in the Trace Database, ATF has not adopted a blanket policy of nondisclosure. ATF instead has sought to release as much information to the public as can safely be disclosed without compromising law enforcement activities or impairing individuals' privacy. See J.A. 25-26. Except for individual names and addresses, which are withheld indefinitely pursuant to Exemption 7(C), virtually *all* of the information in the Trace Database is eventually released to the public after the period for withholding under Exemption

7(A) expires. And apart from the names and addresses, all but nine of the approximately 300 data elements in the database are withheld for a period of only one year (the other nine are withheld for five years). See J.A. 32-34. Thus, far from reflexively opposing all public scrutiny of information contained in the Trace Database, ATF has sought conscientiously to implement a nuanced disclosure policy that respects FOIA's open government objectives while safeguarding law enforcement efforts.

C. ATF Reasonably Determined, And Extensively Explained Its Conclusion, That Premature Release Of Information In The Trace Database Could Be Expected To Cause Interference With Law Enforcement Investigations

To explain and defend the withholding practices that are at issue in this case, ATF did not simply offer conclusory assertions that release of the requested records would undermine law enforcement. Rather, ATF submitted a declaration, executed by an agency official with long experience in law enforcement firearm tracing and FOIA implementation (see note 4, *supra*), that was both comprehensive and highly detailed. See J.A. 18-58. Appended to that declaration were letters from the heads of two organizations that represent law enforcement officers nationwide, opposing public disclosure of the Trace Database on the ground that release would hinder criminal investigations and threaten harm to law enforcement personnel and others. See note 4, *supra*.

ATF's declaration described in general terms the law enforcement concerns implicated by release of firearm trace information. See J.A. 24-26. In addition, the declaration contained particularized analyses of the disclosure issues pertaining to each of the six general categories of information contained in the Trace Database. See J.A. 35-36 (requester information data); J.A. 36-39 (weapon data); J.A. 39-40 (recovery location data); J.A. 40-41 (possessor and associates data); J.A. 41-44 (FFL identification data); J.A. 45-46 (purchaser identification data).[21] ATF's declaration thus exemplifies the generic or categorical approach endorsed by this Court in *Robbins Tire*. The declaration identified a range of circumstances in which release of information within the Trace Database could threaten the integrity of law enforcement investigations.

1. In many instances, information contained in the Trace Database could alert persons involved in criminal activity that a particular firearm has been recovered by law enforcement officials and that an investigation has commenced. By way of example, ATF's declarant explained that "in a case where someone kills four people at a local fast food restaurant and dumps the gun down the sewer on the next block, disclosure of the recovery location could tip the suspect that the police have found the weapon, and thus could be closing in on him prior to the time that the police are ready to arrest him." J.A. 40. The criminal would then have an obvious incentive to thwart the investigation by threatening or silencing potential witnesses, or by fleeing the jurisdiction. Although respondent has contended (Br. in Opp. 18) that traced firearms are "almost always [recovered] as the result of a search of a suspect or arrestee" (who will thus necessarily be aware that police have the weapon), that assertion has no basis in the record, and ATF has informed this Office that approximately 30% of all trace requests do not tie the weapon to any individual possessor.

Even when the recovery of the firearm is known to the person from whom it was seized, and perhaps also to persons who were with him at the time of the seizure, others in-

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[21] The first four categories represent data obtained from the agency requesting a firearm trace; the last two categories represent information that ATF acquires in the course of the tracing process and then provides to the agency that has requested the trace.

volved in the underlying criminal activity (such as a higher-level member of a criminal syndicate) may be unaware that authorities have obtained the weapon and that an investigation has commenced. Public disclosure of that information could facilitate efforts to impede the investigation by (*e.g.*) intimidation of potential witnesses. That danger is particularly acute in situations where the firearm's last known possessor and/or his associates have chosen to cooperate with law enforcement officials. See J.A. 41 ("To the extent that an associate became a witness or informant, the routine public disclosure of his name and address could put him in physical danger or, at minimum, discourage witness or informant cooperation in future investigations."). Or, when an illegal trafficker in firearms sells a gun that is subsequently recovered in connection with a crime, disclosure of trace data could alert the trafficker that his activities may come under police scrutiny. Thus, even with respect to a firearm seized from an individual, public disclosure of Trace Database information may bring the existence of an ongoing investigation to the attention of other persons who were previously unaware of the fact and who may have an incentive to disrupt law enforcement efforts.

Similar concerns exist when a person involved in criminal activity transfers a firearm (by sale or otherwise) to a person who (unbeknownst to the transferor) is in fact an undercover law enforcement officer or government informant. In that situation, the last known possessor of the gun (and perhaps his confederates) will be aware that he has relinquished ownership of the weapon, but will not be aware that law enforcement officials have acquired it. If the criminal is able to determine that a trace of the weapon has been requested, he will understand that his activities are the subject of police attention and may well deduce the identity of the undercover officer or informant. See J.A. 35-36, 42-43. Under those

circumstances, "the investigation could be compromised and the police officer's safety could be in jeopardy." J.A. 36.

2. Even when the relevant criminal actors are aware in general terms that a law enforcement investigation has been initiated, public disclosure of the various data elements contained in the Trace Database may apprise them of additional details that will enable them to impede the investigation. For example, the leader of a criminal organization may be aware that one of his subordinates has been apprehended and a gun recovered, but unaware of the identities of *associates* present at the time of the arrest. Those associates "may be witnesses, suspects, or acquaintances of suspects, and thus, their public identification with a crime may cause them to flee the jurisdiction, inform the perpetrator of the investigation and the trace, or manufacture an alibi for any possible involvement with the crime." J.A. 41. Alternatively, persons who have acquired a gun and used it in criminal activity may be unaware of the identity of the *first retail purchaser* of the firearm; yet that individual may furnish a crucial link in the evidentiary chain that would tie them to the gun and thus to the crime. In addition, public disclosure of the *name of the agency that requested the trace* may give criminals an enhanced understanding of the nature of the investigation, including the possible identities of undercover officers. See J.A. 35-36. Thus, premature release of particular data elements contained in the Trace Database may compromise ongoing investigations in numerous ways, even where the wrongdoers are already aware that the investigation exists.

3. Even apart from the danger that criminals will themselves use the Trace Database to impede investigations, public disclosure of the information contained in the database can disrupt law enforcement. For example, "a law enforcement investigation could be compromised if the news media or anyone other than the investigating agency prematurely obtained the trace data. They could then attempt

to trace the firearm(s) themselves and contact potential defendants and witnesses to the crime, thus compromising the investigation by getting to the suspect or witnesses before the law enforcement agents do." J.A. 33; see J.A. 38-39, 42. That danger exists regardless of whether the criminal actors themselves are already aware that an investigation has begun.

4. The value of the Trace Database is not limited to the performance of individual traces and the consequent provision of assistance to discrete investigations of the requesting agencies. In addition, the vast range of information accumulated in the Trace Database serves as a continuing resource for broader-scale investigative efforts to detect systemic violations of the federal firearms laws. The Trace Database enables ATF personnel to discern connections between the numerous (and otherwise largely unrelated) investigations that precipitated the various firearm traces, in ways that the individual requesting agencies could not.

In the Online LEAD program (see pp. 7-8, *supra*), for example, "ATF agents at field offices throughout the country can" utilize information contained in the Trace Database "to identify possible illegal firearms trafficking, independent of any particular trace request." J.A. 27; see also J.A. 26 (describing ATF's linking of a Florida conspiracy to smuggle firearms from a Middle Eastern country with a much larger conspiracy in Ohio). ATF's ability to detect such patterns of unlawful activity would self-evidently be impaired if that investigative resource were made available to the traffickers themselves. See J.A. 38 (ATF's declarant explains that "premature disclosure of the serial numbers [of traced weapons], in conjunction with other released data, would make it more difficult for law enforcement agents to discern firearms trafficking patterns because traffickers could ascertain whether their purchases are being examined

by law enforcement personnel" and "could shift their purchase patterns and firearms sources to avoid detection").

5. The cumulative harms that would be caused by release of the requested records are likely to be enormous. That is partly due to the sheer volume of information that the database contains. See J.A. 24 ("As of November 9, 2000, the [Trace Database] contain[ed] the results of 1,261,593 traces."); note 5, *supra* (figures as of September 2002). In addition, the features of the Trace Database that make it an especially useful investigative resource for ATF's Special Agents nationwide—*e.g.*, its computerized format and the consequent accessibility of discrete data entries contained within it—increase the potential for misuse if the database is made available (*e.g.*, through the Internet) to persons with an incentive to disrupt law enforcement investigations. Cf. *Reporters Committee*, 489 U.S. at 764 (public disclosure of "computerized summary" of individual's criminal history more greatly impairs individual's privacy interests than does "scattered disclosure of the bits of information contained" in the summary).[22]

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[22] Respondent has contended (Br. in Opp. 18) that "the tracing process itself destroys whatever confidentiality might remain, because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace has been requested." But while such persons are *occasionally* participants in criminal wrongdoing, they are scarcely the *primary* threat to the integrity of the underlying law enforcement investigations. Exemption 7(A) is routinely invoked to protect information—*e.g.*, the contents of witness interviews, see *Robbins Tire*, 437 U.S. at 236-242—that is already known to some person or persons outside the government. Moreover, a person who is contacted in the tracing process learns only that a trace has been requested for a particular weapon, not any additional information associated with the trace, such as the persons present and other circumstances under which the firearm was recovered, or the law enforcement agency that requested the trace. J.A. 23. Informing a limited number of regulated entities that a particular trace has been initiated is entirely different from the blanket *public* disclosure—encompassing both the fact of a trace and significant associ-

Disclosure of the entire Trace Database pursuant to the FOIA could also deter other law enforcement agencies from requesting firearms traces in the first instance, thereby impairing ATF's ability to work in conjunction with those agencies to investigate and combat firearms crimes. As ATF's declarant explained, "[b]ecause firearms tracing is voluntary and depends in significant part on the requesting agency's expectation of ATF non-disclosure policy to maintain confidentiality, it is quite apparent that the release of 'trace data' could be expected not only to compromise investigative and intelligence operations, but also to undermine the confidence in the NTC [ATF's National Tracing Center] and the entire tracing process." J.A. 25. ATF has informed this Office that, since the issuance of the district court's ruling in March 2001, the police departments of more than 40 cities—including the City of Chicago—have signed memoranda of understanding with ATF specifically providing that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed to a third party without the consent of both parties to the Agreement." If the FOIA is interpreted to preclude ATF from honoring the confidentiality provisions of those agreements, those (and other) local jurisdictions will be less willing to submit trace requests, and the effectiveness of the tracing program and the law enforcement investigations it is designed to assist will be correspondingly reduced. Such a construction of the FOIA could also be expected to discourage the creation and use of similar law enforcement databases by ATF and other federal agencies.

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ated data in more than 200,000 criminal investigations each year—that release of the entire database under the FOIA would entail.

D. The Court Of Appeals Offered No Persuasive Ground For Rejecting ATF's Considered Judgment That Premature Release Of Information In The Trace Database Could Reasonably Be Expected To Cause Interference With Law Enforcement Proceedings

In its initial opinion, the court of appeals repeatedly chided the government for failing to identify (a) specific instances in which release of similar information had previously caused interference with law enforcement activities, or (b) specific current investigations that would be impeded by disclosure of the requested data. See Pet. App. 8a-10a. The court did not expressly announce that an agency in invoking Exemption 7(A) must always support its predictions of harm by reference to specific prior or current investigations. But given the court of appeals' repeated references to that supposed gap in the government's proof, and the court's failure to identify any *other* defect in the government's evidentiary submission, the court's initial opinion is most naturally read to reflect the view that some such showing is required.[23]

Any such evidentiary requirement is flatly inconsistent with *Robbins Tire*, which made clear that an agency in invoking Exemption 7(A) may rely on reasonable categorical judgments and is not required to establish that release of the withheld information would interfere with a *specific* existing or contemplated law enforcement proceeding. See pp. 35-37, *supra*. The government filed a petition for rehearing in this case, which noted that inconsistency with *Robbins Tire*. Gov't Pet. for Reh'g 9-10. The petition also pointed out that, because ATF had not previously released the sort of infor-

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[23] The district court likewise attached primary significance to the fact that "ATF is not aware of a single instance in which an actual investigation was compromised as a result of" private parties' scrutiny of trace data. Pet. App. 26a.

mation that is at issue in this case, it could not realistically be expected to identify prior instances in which similar releases had resulted in harm to law enforcement efforts. *Id.* at 10-11.

In response to that rehearing petition, the court of appeals amended its opinion to acknowledge that, under *Robbins Tire*, the government need not identify specific instances of harm. Pet. App. 17a-18a. The court also acknowledged that ATF could not reasonably be expected to identify actual instances of prior misuse "in light of the fact that this type of information has never before been released." *Id.* at 18a. Under the court of appeals' amended opinion, the court's affirmance of the district court's judgment rests on the statement that "ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable*. Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." *Id.* at 18a.

The government does not dispute the abstract proposition of law, reflected in the court of appeals' amended opinion, that an agency's predictions of harm to law enforcement will support withholding of documents pursuant to Exemption 7(A) only if those predictions are "reasonable." But the government's burden in that regard is only to "trace a rational link" between the nature of the document and the interference with enforcement proceedings that could be expected to result from disclosure. *Crooker* v. *BATF*, 789 F.2d at 67. ATF amply satisfied that requirement in the present case. ATF provided a detailed explanation of its withholding practices and the reasons for them, identifying the general types of harms (illustrated by specific examples) that could reasonably be expected to occur in a significant

number of ongoing criminal investigations if the information in the Trace Database was immediately disclosed.

The court of appeals, in rejecting the agency's predictions of likely harm, made no effort to explain in what way ATF's evidentiary showing and explanation were deficient, other than to note the agency's failure to identify specific past or present investigations that had been or would be compromised by disclosure of the Trace Database—a failure that the court ultimately acknowledged was *not* a sufficient ground for finding Exemption 7(A) to be inapplicable. The court's summary dismissal of the agency's evidence is particularly remarkable given ATF's nuanced disclosure policy and supporting declaration, which carefully distinguish between different categories of information with respect both to the length of time for which data are withheld and to the justifications for withholding. See pp. 39-41, *supra*. The court of appeals' brusque rejection of the agency's predictions as "far-fetched"—a characterization presumably meant to cover each of the distinct justifications offered by the agency for withholding different categories of data—reflects either a profound lack of respect for the considered judgment of the expert agency, or the imposition of evidentiary burdens so demanding that they would effectively subvert ATF's ability to employ the "categorical" approach to the implementation of Exemption 7(A) that was approved by this Court in *Robbins Tire*, based on the identification of a "rational link" between the kinds of documents at issue and the types of harms that could result from disclosure.

The consequences for law enforcement under either alternative would be especially deleterious in the case of computerized record systems. Blanket disclosure of information in ATF's vast Trace Database could reasonably be expected to interfere with countless ongoing criminal investigations throughout the Nation in ways as varied as the nature of the investigations themselves, and to put numerous law enforce-

ment personnel and others at risk in the process. Exemption 7(A) was intended to prevent those very consequences.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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